Supreme Court, U.S.
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No. 99-1736

IN THE

Supreme Court of the United States

ROBERT AND OLGA OSTERBERG,

Petitioners,

v.

PETER S. PECA, JR.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF TEXAS

BRIEF IN OPPOSITION

MICHAEL R. "MICKEY" MILLIGAN
Attorney for Respondent
600 Sunland Park Drive
Building 5, Suite 600
El Paso, Texas 79912
(915) 584-9899

160038

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

PARTIES TO THE PROCEEDING

The petition correctly lists the interested parties except as follows. Respondent's name is:

Peter S. Peca, Jr.

TABLE OF CONTENTS

	Page
Parties to the Proceeding	i
Table of Contents	ii
Table of Cited Authorities	iii
Reasons for Denying the Writ	1
Statement of the Case	2
Argument	4
Conclusion	10

TABLE OF CITED AUTHORITIES

Page

Cases:

Browning-Ferris Indus. v. Kelco Disposal, Inc., 492 U.S. 257 (1989) 8

Buckley v. Valeo, 424 U.S. 1, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976) 7, 8

Federal Elections Commission v. Central Long Island Tax Reform Immediately Committee, 616 F.2d 45 (2d Cir. 1980) 8

Missouri Pacific Railway v. Humes, 115 U.S. 512 (1885) 8

Ragsdale v. Progressive Voters League, 790 S.W.2d 77 (Tex. App. - Dallas), *aff'd in part and rev'd in part on other grounds*, 801 S.W.2d 880 (Tex. 1990) 9

Smith v. California, 361 U.S. 147, 80 S. Ct. 215, 4 L. Ed. 2d 205 (1959) 6

United States v. X-Citement Video, Inc., 513 U.S. 64, 78, 115 S. Ct. 464, 130 L. Ed. 2d 372 (1994) 6

Cited Authorities

Page

Statutes:

Texas Election Code, § 253.131 ..... 5, 7

Texas Election Code, § 254.123 5

Texas Election Code, § 254.124 4

Respondent, Peter S. Peca, Jr. ("Peca"), respectfully submits this Brief in Opposition to the Petition for Writ of Certiorari filed by Petitioners, Robert and Olga Osterberg ("Osterbergs"), seeking review of the judgment and opinion of the Texas Supreme Court rendered on February 3, 2000, reported at 12 S.W.3d 31.

REASONS FOR DENYING THE WRIT

The first question presented by the Petition incorrectly suggests that the Osterbergs' only knowledge was that they were engaging in core political speech by directly spending $28,695 in television advertising to oppose Peca's re-election as a district judge. Pet. at i. To the contrary, the Charge of the Court submitted to the jury defined "knowingly," in pertinent part, as follows: "A person acts **knowingly**, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to be in violation of the law." Tr. 92-93. Thus, the jury found that the Osterbergs were aware that they were in violation of the election code by finding that the Osterbergs "knowingly made or authorized one or more direct campaign expenditures that were made either in opposition to Peca or in support of Biel during the period beginning the 39th day before election day and continuing through the 10th day before election day." Pet., App. at 117 (Question No. 1) and 118 (Question No. 5). The jury also found that each of the Osterbergs were acting in concert with one or more other persons, that the amount of the direct campaign expenditures was $28,695, and that the Osterbergs failed to timely file a report of expenditures. Pet., App. at 117-119. Although the Court of Appeals found that there was legally insufficient evidence to support the jury's finding that Olga knew she was violating the law, the Texas Supreme Court did not address that issue.

Pet., App. at 10. The Texas Supreme Court's opinion correctly holds that ignorance of the law is not a defense to the civil damages provisions of the election code, and, the Osterbergs' contention that they are entitled to the protection of ignorance of the law as a defense is moot because of the jury's finding that they were aware that their conduct was reasonably certain to be in violation of the law.

The second question presented by the Petition misrepresents the Texas Election Code by suggesting that only a public official may sue to enforce violations of the election code, when in fact, any candidate for office may sue to recover damages for expenditures which are in violation of the code, and are either in support of the candidate's opponent or in opposition to the candidate. Pet. at 2. The issue is not punishment of political opponents, but enforcement of the election code. An election code which cannot be enforced is meaningless.

STATEMENT OF THE CASE

Some of the "facts" alleged by Petitioners are incorrect and contradict the record. Therefore, Peca deems it necessary to respond so as to reflect the true facts in the record.

The Osterbergs incorrectly allege that they didn't coordinate their television ads with Biel. Pet. at 3. In fact, the Osterbergs and Biel used the same person, James Fitzgerald, to purchase and place their television ads with local TV stations. IV, 124-125, 129-130. Further, the Osterbergs, Biel and his wife, James Fitzgerald, and others periodically met for breakfast at "The Fowl Place," the Osterbergs' restaurant. IV, 205-206; V, 394.

Contrary to the allegation in the Petition that Robert had a problem signing his name, and that Olga signed a blank book of checks on their joint account so that Robert could use them, (Pet. at 3), when Robert's trial counsel specifically asked him this on direct examination, he said: "No, she didn't help me." IV, 216. On cross-examination, Robert admitted that he had signed his name on an affidavit in the case which said, in effect, that he could not sign his name. IV, 218. PX 27. Robert also admitted that he signed a letter about this case to the judge of this case on April 2nd, less than a month after the election. IV, 219. PX 28. Olga did not appear for trial or testify by deposition, nor did she request a continuance.

The Osterbergs incorrectly allege that a political committee made up of lawyers supporting Peca ran ads showing that all the money spent against Peca was coming from one individual. Pet. at 4. In fact, the television ad by the lawyers didn't mention the Osterbergs or their expenditures.

Contrary to the representation in the Petition, the jury did not find that the Osterbergs "acted in concert with each other". Pet. at 7. Rather, the jury found that each of the Osterbergs "was acting in concert with one or more other persons when (he/she) made the direct campaign expenditures." Pet., App. at 117 (Question No. 2) and 118 (Question No. 6). There were several persons involved with the Osterbergs' political activities, including Biel, James Fitzgerald, and several lawyers who were friends of the Osterbergs. V, 318, 336, 385 and 402. Biel admitted that Robert Osterberg was "a close friend" and that the Osterbergs gave him more than 95% of his total campaign contributions. V, 362, 368. Biel's campaign report reflected that Olga was

his first campaign contributor and gave him $1,200 to pay his filing fee on January 3, 1994. V, 356. PX 14. On February 8th, a month before the election, Peca announced in a candidates' forum at a local bar association meeting, attended by Biel and 6 to 12 lawyers from the law firm representing Osterberg, (V 281-282), that Robert Osterberg was violating the election code. Biel admitted that he was in Osterberg's home 2 days later, on February 10th, to obtain a $22,750 campaign check from Osterberg. V, 342. Peca sued Robert on March 10th, two days after the March 8th election, for civil damages under the election code because the $28,695 was spent acting in concert with one or more persons and was not reported. On March 30th, Robert Osterberg filed an answer. During subsequent discovery, Peca learned that Robert didn't sign the checks for such expenditures, and therefore, on April 29th, Olga was joined as a defendant in an amended petition because she had signed the checks. In addition to their direct campaign expenditures opposing Peca, the Osterbergs gave $34,200 to Peca's opponent, Biel, which was reported by Biel on his election code reports.

ARGUMENT

Petitioner's questions presented for review incorrectly suggest that this case is about missing reporting deadlines. In fact, the Osterbergs failed to file the required report. § 254.124, Texas Election Code, requires 3 reports. The first shall be filed not later than the 30th day before election day, covering the day a campaign treasurer appointment is filed and continuing through the 40th day before election day. The second report shall be filed not later than the 8th day before election day covering the period beginning the 39th day before election day and continuing through the 10th day

before election day. § 254.123, Texas Election Code, requires a report to be filed by July 15th, covering the period beginning the first day after the period covered by the last report to be filed under the subchapter.

Osterberg filed his only report on May 4th. Although it included the $28,695 in direct campaign expenditures which should have been reported in the "8 day" report, it also included additional direct campaign expenditures incurred after the election, required on the July 15th report. Thus, the only report filed by the Osterbergs was the July 15th report, which they filed early. They failed to file the "8 day" report covering only expenditures beginning the 39th day before election day and continuing through the 10th day before election day. Therefore, the issues of the Petition for Writ of Certiorari, claiming that they merely "missed reporting deadlines" is yet another misrepresentation of the record. The Osterbergs did not file an "8 day" report. Pet. at 5; V, 280; PX 13.

The record does not raise the scienter issue as claimed by Petitioners because the charge of the court defined "knowingly," in pertinent part, as follows: "A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to be in violation of the law." Tr. 92-93. Petitioners claim that Sec. 253.131 of the Texas Election Code penalizes them by "imposing liability on an unknowing violator." Pet. at 15. However, the jury found that they were "knowing" violators. Petitioners admit that their definition of "knowingly," requiring that they "know how they were 'in violation of' Chapter 253 of the Texas Election Code," was given to the jury in the court's charge. Pet. at 6. However, their reasons for granting the writ fail to refer to this

significant finding by the jury against them. Their argument that they are "unknowing violators" contradicts the record.

Petitioners' speciously claim that they have less rights than child pornographers, pursuant to *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 73-4, 78, 115 S. Ct. 464, 469-470, 472, 130 L. Ed. 2d 372 (1994). In X-Citement, this Honorable Court held that the term "knowingly," as used in the federal statute upon which criminal prosecution was based, applied to the elements of the crime of transporting in interstate commerce the visual depiction of a minor engaged in sexually explicit conduct, concerning both the minority of the performer and the sexually explicit nature of the material, despite the natural grammatical reading of the act under which the scienter element would apply only to the transport element. Evidence at trial suggested that the defendant had full awareness of the film's underage sexually explicit performances. *Id.* at 466. Although the Ninth Circuit reversed the conviction, this Court reversed the Ninth Circuit for the foregoing reasons, and thereby affirmed the conviction. There is an analogy here, but not the one to which the Osterbergs allude. The interpretation of "knowingly" concerned whether the defendant knew the fact that the star of the film was underage, not whether the interstate transporting of child pornography violated federal law. Here, the jury found that the Osterbergs knew that they were making tens of thousands of dollars in express advocacy "direct campaign expenditures" and knew that their conduct was "reasonably certain to be in violation of the law." Pet., App. at 117-119.

Petitioners inappropriately make an analogy between their case and *Smith v. California*, 361 U.S. 147, 80 S. Ct. 215, 4 L. Ed. 2d 205 (1959). Smith, a bookstore proprietor, didn't

claim ignorance of the obscenity law, rather he contended that the municipal obscenity law failed to require any knowledge by him of the contents of the book which he had in his possession. On the other hand, the jury found that the Osterbergs knowingly made independent campaign expenditures for a television ad that was express advocacy pertaining to a judicial election, and that they were aware that their conduct was reasonably certain to be in violation of the law. The comparison between the Osterbergs and Smith is inapposite, and Petitioners' claim in their conclusion that they are unknowing violators contradicts the record.

Although the Osterbergs did not challenge the *severity* of the damages section of Section 253.131, Respondent believes a comment thereon is appropriate. The amount of damages allowed by the statute is not unreasonable because damages are determined by the amount unlawfully spent. It is unlikely that a smaller or fixed penalty would have a deterrent effect on a person with the ability and willingness to spend tens of thousands of dollars in one local judicial race.

Petitioners erroneously state in their second question that the election code statute allows "a public official" to sue political opponents. The statute allows "a candidate" to file suit, and a candidate is not necessarily a public official, certainly not the first time he is a candidate for office. The statute does not affect free speech or impede the ability to criticize public officials, but it does require those who would actively participate in an election by making direct campaign expenditures to timely report such expenditures so that the electorate can be informed.

This Court has upheld statutes requiring the reporting of political expenditures. The opinion in *Buckley v. Valeo*, 424 U.S. 1, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976), sustained

the disclosure and reporting provisions of the federal act. *Id.* at 693-694. This Court said that "disclosure" requirements, as a general matter, directly serve substantial governmental interests. *Id.* at 657-658. Disclosure requirements provide the electorate with information as to the source of political campaign money and how it's spent. Disclosure enables the electorate to evaluate candidates, helps to deter actual corruption and avoids the appearance by exposing large expenditures to the light of publicity. *Buckley* and its progeny have distinguished the difference between a maximum limitation or cap on political expenditures and reporting requirements for such expenditures. *Buckley*, 96 S. Ct. 664; *Federal Elections Commission v. Central Long Island Tax Reform Immediately Committee*, 616 F.2d 45, 52-53 (2d Cir. 1980).

It is axiomatic that the power to require reporting includes the power to punish a failure to report. If the power to punish violations is constitutional, then the issue of who may bring the enforcement action is irrelevant. "[T]he identity of the recipient of a monetary penalty is irrelevant for purposes of determining the constitutional validity of the penalty." *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 299 (1989) (O'Connor, J., concurring in part and dissenting in part), citing *Missouri Pacific Railway v. Humes*, 115 U.S. 512, 522-23 (1885). Regardless of Peca's motivations in bringing suit under the election code, it is a court, not an opposing party, who decides whether the Osterbergs acted unlawfully and thus could be subject to liability. Pet., App. at 35-36.

Enforcement of election laws is inherently highly political. Texas is divided into 254 counties with thousands of positions filled by election in districts of county size or

less in which all campaign finance reporting is maintained at the county level. All prosecutors at the state, district and county levels are themselves elected officials and subject to the civil enforcement provisions of the election code. Moreover, these elected prosecutors are themselves dependent on the support of the same voters who both support and oppose candidates for other elected offices in their districts. Civil enforcement statutes are a legitimate means of deterring violations and encouraging enforcement by candidates, while shifting both the political and economic costs of enforcement to those directly participating in the process. The Texas Supreme Court so held in this case. Pet., App. at 34 (*citing Ragsdale v. Progressive Voters League*, 790 S.W.2d 77, 84-85 (Tex. App. - Dallas) (construing an earlier version of section 253.131), *aff'd in part and rev'd in part on other grounds*, 801 S.W.2d 880, 881 (Tex. 1990).

CONCLUSION

Petitioners have failed to offer any compelling reason for this Court to grant a Writ of Certiorari. Although Petitioners do not deny that Texas has the right to require direct campaign expenditures to be reported, they contend that the statute authorizing the civil enforcement of such requirement is unconstitutional. Their argument contradicts the record. The Texas Supreme Court reviewed the entire record of the trial and considered their constitutional argument, and determined that their constitutional claims were without merit. This case does not raise any new, novel or unsettled question of law requiring the attention of this Court, and does not merit further review by this Court.

For all of the foregoing reasons, Respondent Peter S. Peca, Jr. requests that Petitioners' petition be denied.

Respectfully submitted,

MICHAEL R. "MICKEY" MILLIGAN
Attorney for Respondent
600 Sunland Park Drive
Building 5, Suite 600
El Paso, Texas 79912
(915) 584-9899